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No. 79-870

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,
APPELLANT

v.

GERHARD H. FRITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

REPLY BRIEF FOR THE APPELLANT

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1. A central theme of appellee's argument is that the class he represents was singled out and uniquely deprived of the opportunity to receive a portion of the total railroad retirement benefits that its members expected to receive under the law in effect prior to the passage of the Railroad Retirement Act of 1974. This claim is erroneous.[1]

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[1] Even before 1974, Congress had provided that a person could not receive full benefits under both the Railroad Retirement Act and the Social Security Act. In 1966, 1968, and 1970, when Congress increased the amount of regular railroad retirement annuities to correspond to recent increases in the amount of social security benefits, it provided that the increase for persons who were also receiving social security benefits would be offset by the amount of the recent

Individuals who had not yet retired by January 1, 1975, may receive a full "windfall" benefit under 45 U.S.C. 231b(h)(1) only if, by that date, they had performed the ten years of railroad work necessary to receive railroad retirement benefits and a sufficient amount of non-railroad work to be fully insured under the Social Security Act, and then only if they (i) performed some railroad service in 1974, (ii) had a "current connection" (see 45 U.S.C. 231(*o*)) with the railroad industry on December 31, 1974, or when they later retired, or (iii) had completed 25 years of railroad service as of December 31, 1974. *Everyone else* is excluded from receiving the full "windfall" component of a railroad retirement annuity provided under 45 U.S.C. 231b(h)(1).[2]

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increase in those benefits. Pub. L. No. 89-699, Section 201(b), 80 Stat. 1075-1076; Pub. L. No. 90-257, Section 104(a), 82 Stat. 17-18; Pub. L. No. 91-377, Section 1, 84 Stat. 791. See generally D. Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* 390-392 (GPO 1978). (This is the "offset" referred to in footnote 1 to the chart set forth in our opening brief, at 7 n.5.) Indeed, as far back as 1953, the congressional Joint Committee on Railroad Retirement took note of the Railroad Retirement Board's position that while dual benefits did not then pose a serious problem for the railroad retirement system, either the Social Security Act or the Railroad Retirement Act could be amended in the future if the problem became more severe. S. Rep. No. 6, Pt. 1, 83d Cong., 1st Sess. 6 (1953), quoted in H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 8 (1974), and S. Rep. No. 93-1163, 93d Cong., 2d Sess. 8 (1974).

[2] Of course, persons such as appellee, who had left the railroad industry before 1974 without retaining a current connection to it at the close of that year, could receive a somewhat smaller "windfall" benefit under 45 U.S.C. 231b(h)(2) if they had 10 years of railroad service and were fully insured under the Social Security Act at the close of the year they left

To be sure, the section excludes the appellee class, which is comprised of people who had satisfied then-existing eligibility criteria under both Acts by January 1, 1975 but who had left the industry (without 25 years of service) prior to 1974 and retained no "current connection" with the industry at that time. But many others who also may have had an expectation of realizing the "windfall" of dual benefits upon retirement are excluded from eligibility as well.

For example, there were a substantial number of persons employed by the railroad industry when the 1974 Act was passed who had already worked the requisite number of non-railroad quarters to be fully insured under the Social Security Act but had not yet performed the ten years of railroad work necessary to be eligible for a railroad retirement benefit.[3] These employees are completely barred from receiving any "windfall" benefit, even if they fully intended to complete their working lives in the railroad industry and therefore expected to receive full dual benefits

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railroad work. Appellee fails to appreciate the significance of this alternative means of qualifying. Individuals who had already retired by the effective date of the 1974 Act and were receiving dual benefits are covered by a separate "grandfather" provision in Section 204(a)(3) of the Act, 45 U.S.C. 231 note.

[3] Statistics compiled by the Railroad Retirement Board in 1973 for use by the Joint Labor-Management Railroad Retirement Negotiating Committee ("Joint Committee") show that as of December 1972, there were 58,700 active railroad employees who were fully insured under the Social Security Act but had less than ten years of railroad work. All but 3,800 of these were under 55 years of age and therefore had sufficient time before retirement to accrue the ten years of railroad work necessary to be eligible for a railroad retirement annuity as well. Deposition of William L. Burner, Jr., Exh. B, at 16.

under both Acts when they retired.[4] By the same token, there were no doubt many employees who had left the railroad industry after ten years of service prior to 1974 but had not yet accrued the requisite number of quarters of non-railroad work to be fully insured under the Social Security Act by December 31, 1974. These individuals are likewise precluded from receiving any "windfall" benefit, even though they may have expected to become eligible to receive full dual benefits under both Acts when they retired.[5]

Thus, the appellee class is merely part of a broader category of individuals who may have had some expectation under the law in effect prior to 1974 of receiving the "windfall" of dual benefits when they retired. This Court has held, however, and appellee concedes (Br. 23), that social security and railroad retirement benefits are noncontractual and that Congress is free to amend the governing statutes and reduce or eliminate benefits—and thereby to alter the

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[4] Early in the work of the Joint Committee, labor representatives sought to protect the expectations of these active railroad employees by proposing that the bar to receipt of the "windfall" component apply only to employees hired after the effective date of the new Act. They soon abandoned that position, and it was not included in the Joint Committee's recommendation to Congress. See letter dated January 25, 1974, from William H. Dempsey, Chairman, National Railway Labor Conference, to C.A. Ball, *et al.*; Deposition of William L. Burner, Jr., Exh. F, at 2.

[5] Although the Joint Committee apparently considered extending "grandfather" protection to some persons in this category, the suggestion did not find its way into the Joint Committee's recommendation to Congress. See Deposition of William L. Burner, Jr., Exh. B, at 1.

expectations of present and prospective beneficiaries. See *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979); *Flemming* v. *Nestor*, 363 U.S. 603, 610-611 (1960). Congress has done so here with respect to all of the current and former employees just described.

2. a. Appellee contends, however (Br. 43-50), that it was irrational for Congress to deny "windfall" benefits to the class he represents because members of the class were fully "vested"—*i.e.*, had satisfied then-current eligibility requirements—under both Acts by the end of 1974, just like the individuals who are eligible for a "windfall" benefit under 45 U.S.C. 231b(h)(1). But in focusing on this similarity alone, appellee "ignores that a common characteristic shared by beneficiaries and nonbeneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Johnson* v. *Robison*, 415 U.S. 361, 378 (1974). Here, the characteristic peculiar to those eligible to receive a "windfall" benefit under 45 U.S.C. 231b(h)(1) is that they, unlike appellee's class, had an affiliation with the railroad industry in 1974 or when they later retired.[6] Congress reasonably could conclude, as it did in enacting 45 U.S.C. 231b(h)(1), that employees who remain in the railroad industry would generally have more of a stake in the industry than those who had left and that they were therefore

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[6] A person would be eligible to receive a "windfall" benefit under 45 U.S.C. 231b(h)(1) if he was qualified under both Acts and had 25 years of railroad service by the end of 1974, even if he had previously left the industry. As noted in our opening brief (at 33-34), this constitutes a reasonable reward for persons who spent a major portion of their careers in railroad work. Appellee concedes that this distinction is rational (**Motion to Affirm 8 n.4**).

more deserving of the special annuity component at issue here.

b. Appellee argues (Br. 51-53) that the requirement in 45 U.S.C. 231b(h)(1) that the beneficiary have an affiliation with the railroad industry in 1974 is not a fair test of affinity for railroad work because most of the members of his class left the industry involuntarily. Contrary to appellee's implicit contention, however, Congress was not required to focus on the reasons why employees may have stayed with or left railroad work in the past; Congress could just as reasonably focus on the employment situation in the industry as it existed in 1974, without regard to prior events. The retirement system was, after all, designed "for persons who pursue careers in the railroad industry." *Hisquierdo* v. *Hisquierdo, supra,* 439 U.S. at 573. When Congress considered and passed the Act in 1974, it was the persons described in 45 U.S.C. 231b(h)(1) who were pursuing or were likely to have pursued careers in the railroad industry. Members of appellee's class, in contrast, had left railroad work altogether.[7]

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[7] Appellee suggests (Br. 47-48) that the work-in-1974 requirement in 45 U.S.C. 231b(h)(1) does not measure career status because it protects an individual who worked only "one day" in 1974. But the work-in-1974 criterion obviously was not designed for the specific purpose of protecting a person who had only one day of service in that year. The vast majority of employees who had any railroad work in 1974 would have worked throughout the year, as well as in preceding and succeeding years, and would therefore have had a relatively permanent attachment to the industry. This classification is not rendered irrational because it may also incidentally include a person who worked only one day in 1974. *Califano* v. *Jobst,* 434 U.S. 47, 53 (1977).

The alternative criterion in 45 U.S.C. 231b(h)(1)—that the person have a "current connection" with the industry in

c. Appellee has fallen far short of establishing that the statutory classification is irrational, even assuming that the classification was drawn principally on the legislative premise that the majority of the members of the appellee class had left railroad work voluntarily. Appellee relies in large part (Br. 51) on sworn answers he received from 41 members of the class in response to "interrogatories" to which he requested them to respond.[8] But appellee has not demonstrated that these 41 persons constitute a representative sample of the 86,000 former railroaders who would receive full "windfall" benefits under the district court's decision. Moreover, a review of these answers discloses that three of the 41 respondents

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1974—largely overlaps with the work-in-1974 criterion, because most people who performed some railroad work in 1974 would also have performed such work for 12 of the 30 months preceding December 31, 1974, and would thereby satisfy the "current connection" test as well. As explained in our opening brief (at 29 n.15), the "current connection" provision principally serves to protect workers who may have been on furlough or otherwise temporarily out of railroad work in 1974.

Appellee concedes (Br. 45) that there is a history of using the "current connection" concept in determining eligibility for other benefits under the Railroad Retirement Act (see our opening brief, at 35-37). He contends, however, that the present case is distinguishable because that test has never before been used to limit eligibility for an existing benefit. Contrary to appellee's suggestion, however, we believe that Congress' reliance on the well-established "current connection" concept underscores, rather than undercuts, the reasonableness of its approach in phasing out "windfall" benefits.

[8] See Exh. A (individual class members' sworn answers to interrogatories referred to in the Notice of Intention to Offer Class Member's Answers to Interrogatories in Evidence at Trial Pursuant to Rule 803(24) of the Federal Rules of Evidence, filed Dec. 12, 1978; R. 314-317).

were fired for cause,[9] 20 stated in response to a specific question that they had *not* left railroad work involuntarily,[10] and four others resigned rather than accept another position with their employer.[11] In short, almost two thirds of the respondents in appellee's own sample did not leave railroad employment under circumstances that could properly be regarded as "involuntary."

Appellee also points (Br. 5, 51) to evidence of a decline in overall railroad employment of more than 50% between 1937 and 1972. But this bare statistic fails to reveal how much of the reduction was accomplished by attrition rather than lay-offs or how this overall trend may have affected members of the class in this case who, with at least ten years of railroad service, had substantial seniority when they left railroad work.[12] Thus, the record wholly fails to establish

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[9] See answers to interrogatories 7 and 8 submitted by class members Brown, Clere, and Reiff; Exh. A, note 8, *supra*.

[10] See answers to interrogatory 7 submitted by class members Bujold, Edwards, Campbell, T. Boyd, Bayers, Bain, Hansen, Macha, Mattson, Krolicki, Branson, Gilliland, Marvin, Szilagye, Fridman, Day, Prescher, Andrews, Nippo, and Sherek; Exh. A, note 8, *supra*.

[11] See answers to interrogatories 7 and 8 submitted by class members Meyer, Richards, H. Boyd, and Howe; Exh. A, note 8, *supra*.

[12] Appellee also relies (Br. 51) on affidavits submitted by two other class members. As pointed out in our opening brief (at 31 n.17), however, even this small sample fails to support appellee's argument, because one of the two employees resigned rather than accept another position with his company. The only other "evidence" on the voluntariness issue cited by appellee is a statement by Senator Domenici, when he introduced a bill to restore "windfall" benefits to the appellee class

that Congress had "no reasonable basis for believing" (*Vance* v. *Bradley*, 440 U.S. 93, 111 (1979)) that a substantial number of individuals who were no longer in railroad work in 1974 had left voluntarily—again, even assuming that this issue is relevant in assessing the constitutionality of 45 U.S.C. 231b(h)(1).

3. Appellee maintains (Br. 9-10, 36-44) that the exclusion of members of the class from eligibility for "windfall" benefits was made necessary by the decision to increase benefits for spouses, widows, survivors and early retirees. In appellee's view, increasing benefits was an "impermissible" goal (Br. 42), in view of the railroad retirement system's actuarial problems. Accordingly, the argument proceeds, the reduction in "windfall" benefits necessary to permit an increase in other benefits was not permissible either. This line of reasoning fails for several reasons.

Most importantly, it scarcely can be "impermissible" for Congress to increase benefits under a social welfare and retirement program such as this, or to adjust the relative amounts of different benefits within the program. Nor are such measures rendered irrational merely because they are undertaken in legislation that is otherwise principally concerned with

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in 1977, that "from existing records and accounts, the majority of these former employees had no choice of staying with the railroads * * *." 123 Cong. Rec. 2230-2231 (1977). The Senator offered nothing in support of this assertion.

Appellee also errs in relying (Br. 51 n.16) on the district court's finding of fact #72 (J.S. App. 26a) to the effect that "many" members of the class were forced to leave the railroad industry involuntarily. The court failed to identify what it meant by "many," either in absolute terms or as a percentage of the overall class. In any event, this finding of fact appears to have been based on nothing more than the scant evidence described above and in the text.

trimming costs. Congress may accomplish different purposes in the same legislation.

Moreover, appellee still has failed to cite any evidence in the legislative record that Congress viewed the increased benefits as dependent on the supposed "sacrifice" of "windfall" benefits for those who left railroad work before 1974. Whether the Joint Committee perceived a quid pro quo relationship between the two is irrelevant (see Appellant's Br. 45-47), although the evidence in the record indicates that it did not.

For exampie, William H. Dempsey, the management representative of the Joint Committee, testified in the House Hearings that if the unions had agreed not to increase benefits, the Joint Committee nevertheless would have made "precisely the same argument with respect to the phaseout dual benefit cost." [13] Evidence of the Joint Committee's deliberations also reveals that the Committee reached agreement on the manner of phasing out dual benefits *before* agreement was reached on whether benefits should be increased, not after, as appellee suggests (Br. 10-11, 39, 41). See Deposition of William L. Burner, Jr., Exh. I, at 27-29, 61-62.[14] Finally, although it was estimated that the

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[13] See *Restructuring of the Railroad Retirement System: Hearings before the House Comm. on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 232 (1974). See also *Restructuring of the Railroad Retirement System, 1974: Hearings before the Subcomm. on Railroad Retirement of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 2d Sess. 318, 330 (1974).

[14] Indeed, it appears that the formula eventually enacted in 45 U.S.C. 231b(h)(2), which governs the eligibility for "windfall" benefits of those (like the class members herein) who left the industry before 1974, was proposed because many former railroaders would have received *more favorable* treat-

increased benefits proposed by the Joint Committee would increase the actuarial deficit by about 3% of taxable payroll,[15] the elimination of those persons in appellee's position from eligibility for "windfall" benefits under the provision eventually enacted as 45 U.S.C. 231b(h)(1) was expected to save less than one third of that amount (Deposition of William L. Burner, Jr., Exh. G at 10, Exh. I at 33, 36, 38). This wide disparity confirms that the elimination of dual benefits for members of the class could not have been designed to fund the increased benefits for other recipients.[16]

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ment than active employees under the proposals the Joint Committee then had under consideration. Deposition of William L. Burner, Jr., Exh. I, at ~~284-286, 287~~. 13, 25-26, 61-62

[15] See Letter from the Joint Committee to Senator Williams, Deposition of Hollis G. Duensing, Exh. Q, at 4, 8; 120 Cong. Rec. 18392-18393 (1974).

[16] Appellee errs in arguing (Br. 39, 66) that a paragraph in the Joint Committee's letter to Senator Williams (see note 15, *supra*) demonstrates a trade-off between increased benefits and withholding the "windfall" annuity from class members here. The paragraph quoted is only a recapitulation of the sources of the total deficit in the Railroad Retirement Account and the various means by which the Joint Committee proposed to eliminate that deficit. There is no suggestion in the paragraph that the increase in benefits was dependent on elimination of "windfall" benefits for any particular category of individuals. Moreover, contrary to appellee's suggestion (Br. 39), the 2.5% reduction in the actuarial deficit mentioned in the letter was attributable to *all* measures the Committee recommended to trim dual benefits (including a prohibition against accruing "windfall" benefits in the future), not solely to the manner in which the eligibility of the appellee class and others who had left the industry before 1974 was to be determined. Deposition of Hollis F. Duensing, Exh. Q, at 5-6; 120 Cong. Rec. 18392 (1974).

4. Appellee errs in suggesting (Br. 38, 47, 51-52) that the exclusion of the class members from eligibility under 45 U.S.C. 231b(h)(1) was the result of animus directed toward them because they were no longer members of the railroad unions. He cites no statement by a Member of Congress suggesting such a motivation. In any event, those who left the railroad industry before 1974 and were therefore not union members in 1974 were *not* wholly excluded from receiving windfall benefits; their eligibility is simply governed by a different section, 45 U.S.C. 231b(h)(2). Moreover, the group whose eligibility for benefits was most completely protected consisted of persons who were already retired when the 1974 Act was passed and were therefore not union members either. Conversely, many employees who were still in the railroad industry, and therefore union members, were deprived of the expectation of receiving full dual benefits in the future if they had not qualified for benefits under both statutes by the end of 1974. Accordingly, there simply is no basis in the record for concluding that 45 U.S.C. 231b(h)(1) has the purpose or effect of discriminating on the basis of affiliation with a union.

5. Appellee argues (Br. 68-71) that the Court should not consider the propriety of the relief ordered by the district court if the Court concludes that the statutory classifications established in 45 U.S.C. 231b(h)(1) are unconstitutional, because the issue of remedy was not presented to the court below or identified as a separate question in the Jurisdictional Statement. But the general rule barring consideration of issues not raised below or separately presented in the jurisdictional statement or certiorari petition is not an inflexible one, and the Court has considered such questions in appropriate circumstances. See

Cuyler v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 7 n.6; *Carlson* v. *Green*, No. 78-1261 (April 22, 1980), slip op. 2 n.2; *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980).[17] Several factors weigh in favor of the Court's consideration of the proper relief, should it conclude that 45 U.S.C. 231b(h)(1) unconstitutionally distinguishes among beneficiaries.

First, the issue concerns only the nature of the appropriate remedy and is, in this sense, closely related to the resolution of the constitutional issue presented to the Court. Cf. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 371-372 n.4 (1967).[18] Indeed, the nature of the appropriate remedy depends in part on the same assessment of legislative purposes underlying the provision for "windfall" benefits that must be undertaken to resolve the constitutional issue itself. See, *e.g.*, *Califano* v. *Westcott*, 443 U.S. 76, 91-93 (1979); *id.* at 94-96 (Powell, J., dissenting); *Welsh* v. *United States*, 398 U.S. 333,

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[17] See also *Procunier* v. *Navarette*, 434 U.S. 555, 560 n.6 (1978); *Connor* v. *Finch*, 431 U.S. 407, 421 n.19 (1977); *Washington* v. *Davis*, 426 U.S. 229, 238 (1976); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 371-372 n.4 (1967). Cf. Sup. Ct. R. 34.1(a).

[18] Moreover, this case is before the Court on direct appeal from the district court under 28 U.S.C. 1252, and it therefore has not benefited from the full fleshing out of issues afforded by intermediate review in the court of appeals. It is clear that this Court may consider the nature of the relief that should be granted, because an appeal under 28 U.S.C. 1252 brings the "whole case" before the Court, not merely the constitutional question. *Williams* v. *Zbaraz*, No. 79-4 (June 30, 1980), slip op. 8, quoting *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

365-366 (1970) (Harlan, J., concurring). And the issue has been briefed by the parties. *Carlson* v. *Green*, *supra*, slip op. 2 n.2.

Also bearing on the need for review of the remedial issue is the current financial condition of the railroad retirement system. In recent testimony, the Chairman of the Railroad Retirement Board informed the House Committee on Interstate and Foreign Commerce that the Board's actuary has estimated that the system could run out of money to cover existing benefits as early as 1982.[19] Under these circumstances, the Court should not affirm a judgment that would widen the actuarial deficit of the Railroad Retirement Account even more, if the Court has substantial doubts about the correctness of that judgment.[20]

In the latter regard, we note that Congress placed limitations on the receipt of "windfall" benefits in 1974 because the railroad retirement system would be bankrupt by 1981 if the "windfall" was permitted to continue, "and there will be insufficient funds available to pay benefits at the present level to anyone—past, present, or future beneficiaries." S. Rep. No.

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[19] This testimony was delivered on September 4, 1980, at a hearing on H.R. 7793, 96th Cong., 2d Sess. (1980), a bill to amend the Railroad Retirement Act of 1974. The estimate was also contained in the Chairman's prepared statement submitted for the record of the hearing. The transcript of the hearing has not yet been published by the Committee.

[20] The Court observed in *Califano* v. *Westcott*, *supra*, that, although the cost of fully extending benefits to remedy the constitutional infirmity in the statutory provision involved did not preclude the extension of benefits under the circumstances of that case, "cost may prove a dispositive factor in other contexts." 443 U.S. at 93. Given the serious financial problems of the railroad retirement system, we believe that cost is a significant, if not dispositive, factor here.

93-1163, *supra*, at 7; H.R. Rep. No. 93-1345, *supra*, at 7. Much the same situation obtains today, notwithstanding the passage of the 1974 Act, and there is no reason to believe that Congress now would adopt a different approach in the face of a serious deficit and *expand* "windfall" benefits in the manner ordered by the district court. The alternative remedy of limiting "windfall" benefits in the manner suggested in our opening brief (at 51-53 n.33) conforms to legislative intent and present fiscal realities, and once again would allow Congress the opportunity to weigh the competing equities and financial needs of the railroad retirement system. Congress may, of course, extend benefits in the manner ordered by the district court if it so chooses.

In addition, should the Court conclude that 45 U.S.C. 231b(h)(1) is unconstitutional, the propriety of extending benefits would in any event be raised when the district court considers the appropriate relief to be granted to individuals who were not retired by January 31, 1977 and who therefore are not members of the class already certified. See J.S. App. 34a-35a. Principles of sound judicial administration therefore would be served by addressing the issue now (*Carlson* v. *Green*, *supra*, slip op. 2 n.2), or, at the very least, by remanding the question of remedy for the certified class to the district court for consideration together with the nature of relief to be granted to persons not now included in that class.

CONCLUSION

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

SEPTEMBER 1980

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